In The

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General,
Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

NO. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Respondent accepts the statement of Opinion Below of the Petitioner Marquette National Bank of Minnesota.

JURISDICTION

Although the Petitioners each allege that jurisdiction of this Court is based upon 28 U. S. C. 1257(3), Respond-

ent contends that this Court lacks jurisdiction over this cause by reason of the provisions of 28 U. S. C. 2101(c), in that the decision appealed from was entered on November 10, 1977 (B. App. A-47, S. App. A-1),[1] the running of the 90 days in which to file a petition fo[illegible]rit of certiorari was tolled by the filing of a motion for rehearing and commenced running again on the 8th day of December, 1977 when the order denying the rehearing was entered (S. App. A-18; B. App. A-49), and expired on March 8, 1978. The petition for a writ of certiorari was filed on March 13, 1978 after the expiration of the time for applying for a writ of certiorari, which time had not been extended by a Justice of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, Respondent relies upon 28 U. S. C. 2101(c) (R. App. 1) and Article III, Section 2, Paragraph 2 of the Constitution of the United States which provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The following statutes are also cited and reprinted in the Appendix:

Minnesota Statutes	§ 56.13
Nebraska Revised Statutes	§ 8-820

QUESTION PRESENTED

Whether a national bank located and established in Nebraska may charge interest in its bank credit card program to residents of Minnesota at rates allowed by the law of Nebraska in spite of the fact that such rates may be greater than those which are purportedly allowed by a Minnesota statute to national banks located and established in Minnesota?

STATEMENT

First National Bank of Omaha conducts a bank credit card program in which, under certain circumstances, interest is charged to its customers. The rate of interest charged is specifically authorized to banks in making personal loans by the statutes of the State of Nebraska.[2] First National Bank of Omaha is organized, established

1 References to the Appendix herein will be set forth as S. App. for the appendix filed by Petitioner State of Minnesota, B. App. for the appendix filed by Petitioner Marquette National Bank and R. App. for the appendix filed by this Respondent.

2 Nebr. Rev. Statutes § 8-820 (R. App. 6).

and located in Omaha, Nebraska. Its credit card program involves contracts between the Bank and individual cardholders. It also involves contracts with other banks and with merchants. These latter contracts may be with the Bank or with a wholly owned subsidiary of the Bank, First of Omaha Service Corporation, the Respondent here. In no instance does Respondent enter into agreements with cardholders and it does not extend credit or assess or collect interest from cardholders. Except, after assignment of a delinquent account from the Bank, Respondent may collect interest as an incident to collecting such accounts (B. App. A-8 - A-12; S. App. A-25 - A-28).

The rate of interest charged by First National Bank of Omaha, in some but not all cases, might exceed that permitted by the Minnesota statute referred to in Petitioners' application for certiorari.[3]

As amplified by the foregoing and with the exception of the unsupported and inaccurate conclusion that:

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3 The actual amount charged for the credit, expressed as a percentage per annum under the Minnesota statute, would vary with the amount of credit outstanding for a period of time because of the effect of the "annual fee". Thus, if a cardholder had an average balance outstanding of $100 but paid his entire account each month, he would be paying 15% under the Minnesota statute if he were charged a $15 annual fee. The same cardholder under First National Bank of Omaha's credit card program would pay no interest whatever. Further, under First National Bank of Omaha's plan each cardholder is assured of 25 day's credit with no interest charge on his purchases. Under the Minnesota statute the only period of time for which the periodic rate would not be charged (in addition to the annual fee) would be when the entire balance was paid during the billing cycle. That is, although the purchases portion of the account might be billed without charge, unless that entire amount were paid prior to the next billing, interest would be calculated from the date the purchases were debited to the account.

> "This ruling leaves an out-of-state national bank free to charge a higher interest rate to Minnesota customers than that allowed a state or national bank located in Minnesota."

found on page 4 of Petitioner State of Minnesota's application for certiorari, the statement of the case by that Petitioner is accepted.

—o—

ARGUMENT

Reasons for Denying the Writ.

I.

The Application for the Writ was Not Timely Filed.

In their Petitions, Petitioners each assert, erroneously we think, that the judgment of which review is sought was entered on December 14, 1977. In so doing each of them refers to a judgment, basically for costs (S. App. A-18; B. App. A-50), entered over the signature of the Minnesota court's clerk after the entry of the order denying the petition for rehearing entered on December 8, 1977 by a justice of that court (S. App. A-19; B. App. A-48).

It is clear from the previous decisions of this Court that:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months limitation [for certiorari] begins to run from the date of such denial or other disposition."

Citizens Bank of Michigan City v. Opperman, 249 U. S. 448 (1919). *See also Department of Banking v. Pink,* 317 U. S. 264 (1942); *Foreman v. U. S.,* 361 U. S. 416 (1960); *Pfister v. Northern Illinois Finance Corp.,* 317 U. S. 144 (1942); *U. S. v. Healy,* 376 U. S. 75 (1964).

In view of the provision of the order denying the petition for rehearing that:

> "Respondent Marquette National Bank is herewith granted a stay of judgment pending application for a writ of certiorari to the United States Supreme Court." (S. App. A-18, B. App. A-48).

it is clear that nothing further was to be done in that court prior to the expiration of the time allowed in which to file the petition for certiorari. It may even be questioned whether the "judgment" of December 14, 1977 (S. App. A-19, B. App. A-50) was authorized.

Since the time for filing the petition for a writ of certiorari is fixed by Congress in the exercise of its power to prescribe exceptions and regulations of this Court's appellate jurisdiction (Article III, Section 2, Paragraph 2, United States Constitution), compliance therewith has been held to be jurisdictional. *Department of Banking v. Pink,* 317 U. S. 264 (1942). The order of the Minnesota Supreme Court denying the petition for rehearing was entered on December 8, 1977, thus completing all requirements of finality. The time for filing for certiorari commenced on that date and expired on March 8, 1978. Since there was no order enlarging such time, the filings were not timely. The Court should deny review for lack of jurisdiction.

II.

The ruling of the Court below applies a well established principle of law consistently with previous decisions of this and other Federal courts.

Although both petitioners contend that the decision of the Minnesota Supreme Court is erroneous and that it determines a new question which has not been previously ruled upon, examination of the authorities demonstrates conclusively that the decision reached by the Court below was based upon principles of law which were first announced by this Court as long ago as 1874 and which have been consistently applied by other courts since that time.

This Court has repeatedly held that § 85 preempts the direct operation of any state law purporting to control the interest rates of a national bank. In *Farmers & Merchants National Bank v. Dearing,* 91 U. S. 29 (1875), the Court held a New York usury law to be superseded by the National Bank Act stating:

> "In any view that can be taken of the 30th section [now § 85] the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion." 91 U. S. at 35.

And, in *Hazeltine v. Central National Bank,* 183 U. S. 132 (1901), the Court stated:

> "We understand it to be conceded that, as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the state [citing *Dearing,* supra]" 183 U. S. at 134.

State law, of course, is relevant to the operation of § 85 but only to define the available range of options to a national bank in its selection of an interest rate. The Courts of Appeal have correctly construed § 85 to permit a national bank to select any state interest law it wishes as the basis for its charges including the state's small loan laws which typically provide the highest of all regulated interest rates. See *Northway Lanes v. Hackley Union National Bank,* 464 F. 2d 855 (6 Cir. 1972); *Partain v. First National Bank of Montgomery,* 467 F. 2d 167 (5 Cir. 1972); *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8 Cir. 1977).

In no sense can state law, in this case Minn. Stat. § 48.185, directly control the rates of a national bank. Note further that the cases cited above rule out the application of any state penalty or remedy for usury against a national bank. That area, likewise, has been preempted by 12 U. S. C. § 86 which provides the exclusive remedy against a national bank.

National Banks, at least in the area of the rate of interest which they are permitted to charge, are not limited to a status of equality with state banks. They are entitled to a "most favored lender status". That is, National Banks are permitted to charge the highest rate of interest allowed to any lender by the law of the state in which they are located.

This principle was first expressed by this Court in *Tiffany v. National Bank of State of Missouri,* 18 Wall 409 (1874). In that case this Court said:

> "The claim of plaintiff is, that the general provision of the act of Congress, that national banking

> associations may charge and receive interest at the rate allowed by the laws of the state where they are located, has no application to the case of defendants, and that they are restricted to the rate allowed to banks of issue of the state, that is to eight per cent. This, we think, cannot be maintained." *Id.* at 411.

and

> "In harmony with this policy is the construction we think should be given to the 30th section of the act of Congress which we have been considering. It gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons." *Id.* at 412.

That decision was followed in *Daggs v. Phoenix National Bank,* 177 U. S. 549 (1900) where it was said:

> "The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it." *Id.* at 559.

These interpretations of the law have been consistently applied by the courts through the years. *See First National Bank of Mena v. Nowlin,* 509 F. 2d 872 (8 Cir. 1975); *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7 Cir. 1976) cert. den. 429 U. S. 1062 (1977); *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8 Cir. 1977); *Northway Lanes v. Hackley Union National Bank & Trust Co.,* 464 F. 2d 855 (6 Cir. 1972); *Acker v. Provident National Bank,* 512 F. 2d 729 (3 Cir. 1975); *Haas v. Pittsburgh National Bank,* 526 F. 2d 1083 (3 Cir. 1976).

The holdings of the courts concerning this point appear to be nearly unanimous. In the face of such unanimity, arguments concerning congressional intent, supported by references to and quotations from the Congressional Globe seem superfluous, especially when they were previously made and rejected by this Court in *Tiffany v. National Bank of State of Missouri,* 18 Wall 409.

Petitioners, however, further claim that such decisions are distinguishable on the grounds that they did not involve interstate loans. Of course, the two Fisher cases, *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7 Cir. 1976), and *Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8 Cir. 1977) did involve inter-state loans. The Petitioners attempt to distinguish these cases on the ground that an alternate basis for decision was available, that the small loan rates of the states of residence of the borrowers would have permitted the rates charged. This late attempt to introduce a new issue into the case ought not to be tolerated. Let it suffice to say that the small loan rate of Minnesota[4] would have permitted the rates charged by First National Bank of Omaha and the same result, for the same reason of federal preemption, would have followed had the question been timely raised.

Petitioners cite only two cases to support the proposition that the laws of the borrower's residence rather than the laws of the state where the national bank is located should control.

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4 See Section 56.13, Minnesota Statutes as set forth in the Appendix (R. App. 3).

Colorado National Bank of Denver v. Coder, No. 34682 (Mont. Dist. Ct. 1972) is a decision of a state trial court. *Meadow Brook National Bank v. Recile,* 302 F. Supp. 62 (E. D. La. 1969) can be of no precedential value in view of the order granting a new trial entered by the court in that case. (R. App. 7).

The statements and arguments by Petitioner Marquette that:

> "The construction placed upon the National Bank Act by the Minnesota Supreme Court places Minnesota state and national banks in a competitive disadvantage with respect to out-of-state national bank credit card operations; (Brief p. 12)
>
> "What is at stake in the instant case is a determination of whether § 85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state; (Brief p. 18, 19) and
>
> "National Banks located outside of the State of Minnesota by offering their bank credit card "free" without a membership fee of $15 per annum, have a substantial, illegal competitive advantage over petitioner and all other state and local national banks operating bank credit programs in this state." (Brief p. 22)

find no support in the record, but reflect unsupportable, argumentative conclusions of petitioner. The thrust of the argument seems to be that allowing the Nebraska bank to charge a higher rate of interest, while prohibiting it from charging an annual fee somehow make the Nebraska bank card program more desirable to the cardholder (presumably because it is cheaper) than the Minnesota program (presumably because it is more expensive).

The Minnesota statute does not require an annual fee. If the Nebraska program is in fact cheaper and thereby more competitive, there is nothing to prevent the Minnesota bank from dropping or reducing its annual fee to meet such competition. If the complaint is that the Nebraska bank is better compensated under its system than the Minnesota bank and is therefore rewarded disproportionately to the Minnesota bank, there is absolutely nothing in the record to reflect the relative profitability of the two systems. In this connection, it might be noted that this action was not commenced by a cardholder complaining that he was being over charged. It was commenced by a Minnesota bank seeking to prevent Respondent from obtaining cardholders, presumably because Respondent's program was more desirable to the cardholder than the Petitioner's. That is, it could well be inferred that Petitioner desires to prevent price competition in the bank credit card business in Minnesota.

The contention by the Petitioner Minnesota that that state has a deeply rooted interest in protecting its citizens from usury must be viewed in the light of the Minnesota statutes which permit a rate of interest much higher than that charged by the Respondent in this case.[5] Minnesota's concern apparently is not to protect its citizens from such rates, rather, it is to prevent its banks from collecting such rates. A concern which since *Tiffany v. National Bank of State of Missouri,* 18 Wall 409 (1874), has been specifically held not to be enforceable against national banks.

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5 Minnesota Statutes § 56.13.

CONCLUSION

The decision of the Court below includes a decision on a federal question of substance which has been previously determined by this Court and the lower court's decision is consistent with the decisions of this Court. The question, although important, has been decided by this Court and that decision was held by the court below to be controlling.

For the foregoing reasons, it is respectfully submitted that these petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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28 U. S. C. § 2101. *Supreme Court; time for appeal or certiorari; docketing; stay*

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Minnesota Statutes § 56.13

56.13 *Limitations of loans; Interest; Investigation charge*

Subdivision 1. Every licensee hereunder may lend any sum of money not to exceed $1,200 in amount, and may contract for and receive thereon a charge at a rate not exceeding two and three-quarters percent per month on that part of the unpaid principal balance of any loan not exceeding $300, one and one-half percent per month on that part of the unpaid principal balance of any loan in excess of $300 but not exceeding $600, one and one-quarter percent per month on any remainder of such unpaid principal balance; provided in addition the licensee may collect from the proceeds of any loan an investigation charge of $1 for each $100, or fraction thereof, of the principal amount loaned, for expenses including any examination or investigation of the character and circumstances of the borrower, comaker or security, and drawing and taking the acknowledgment of necessary papers, filing fees, or other expenses incurred in making the loan; provided that no such charge shall be collected unless a loan shall have been made. The full amount of the investigation charge authorized by this subdivision shall be fully earned by the time a loan is made without regard to the expenses incurred and shall not be deemed interest; provided, however, if a loan for which an investigation charge was made is renewed within 12 months from the date of the loan, then 1/12 of such investigation charge shall be deemed earned for each month or portion thereof from the date of the loan to the date of renewal, and the balance thereof shall be refunded to the borrower. A loan shall be deemed to be renewed at the time the loan is paid in full if any part of such payment is made out of the proceeds of another loan from the same or affiliated lender. Not more than six months of accrued charges on the unpaid principal balance shall be included in any judgment entered on any loan made hereunder.

Subd. 2. No licensee shall induce or permit any borrower to split up or divide any loan. No licensee shall induce or permit any person, nor any husband and wife, jointly or severally, to become obligated, directly or contingently, or both, under more than one contract of loan at the same time for the purpose or with the result of obtaining a higher rate of charge than would otherwise be permitted by this section.

Subd. 3. No charges on loans made under this chapter, except for investigation charges allowed in subdivision 1 of this section, shall be paid or received in advance, or deducted or discounted from the principal of the loan. Interest charges on loans made under this chapter, except as otherwise provided in subdivision 4 of this section, (1) shall be computed and paid only as a percentage per month of the unpaid principal balances or portions thereof, (2) shall be so expressed in every obligation signed by the borrower, and (3) shall not be compounded; provided that, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under such loan contract may include any unpaid charges on the prior loan which have accrued within two months before the making of such loan contract. For the purpose of computations a month shall be considered a calendar month and where a fraction of a month is involved a day shall be considered one-thirtieth of a month.

Subd. 4. In lieu of computing and collecting charges on actual unpaid principal balances or portions thereof, charges may be precomputed at the agreed monthly rate on scheduled unpaid principal balances of loans contracted to be repaid in substantially equal and consecutive monthly installments of principal and charges combined. The first installment payment may be more or less than succeeding payments to adjust for charges if the first installment period is more or less than one month. Payments on each such precomputed loan shall be applied to the total of principal and charges combined until the contract is fully paid, subject to a refund or credit of unearned charges and to default and extension charges as follows:

(a) The refund or credit to the borrower for prepayment in full by cash, a new loan, renewal, refinancing or otherwise one month or more before the final installment date shall be that proportion of the total precomputed charges (after any adjustment for a first installment period of more or less than one month) which the sum of the monthly balances originally scheduled to follow the installment date nearest the date of prepayment in full bears to the sum of all originally scheduled monthly balances. If prepayment occurs at least fifteen days before the first installment date, the refund or credit to the borrower shall be the total precomputed charges less the amount of charges computed at the agreed rates on the actual unpaid principal balances of the contract for the time actually outstanding.

(b) For each full installment one or more full months past due according to the original terms of the contract, whether by reason of default or extension agreement and if the contract so provides, the licensee may receive a charge not exceeding the amount of refund or credit which would be required if the loan were prepaid in the full on the next to the last installment date multiplied by the number of full months such instailment is so past due. Such charges may be collected as they accrue or at any time thereafter.

(c) If two or more full installments are in default for one full month or more at any installment date and if the contract so provides, the licensee may reduce the contract balance by the refund or credit which would be re-

quired for prepayment in full on such installment date and thereafter receive charges at the agreed rate computed on actual unpaid principal balances of the contract for the time actually outstanding. Charges so collected shall be in lieu of any default or extension charges which otherwise would accrue on the contract after such installment date.

Subd. 5. In addition to the charges herein provided for, no further or other amount shall be, directly or indirectly, charged, contracted for, or received. If any amount other than or in excess of the charge permitted by this chapter is charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, charges, or recompense whatsoever.

Nebraska Revised Statutes § 8-820

8-820. *Personal loans; interest on unpaid balance; fee in lieu of interest*

Subject to the provisions of sections 8-815 to 8-829, any registered bank may contract for and receive, on any personal loan, charges at a rate not exceeding eighteen per cent simple interest per year on the first one thousand dollars and twelve per cent simple interest per year on the balance over one thousand dollars. Notwithstanding the provisions of this section, a bank may charge a minimum fee of five dollars in lieu of interest on small loans.

Minute Entry

November 24, 1969
Heebe, J.

THE MEADOW BROOK NATIONAL BANK

versus

SAM J. RECILE and WILSON P. ABRAHAM
CIVIL ACTION NO. 67-341 SECTION B

This cause came on for hearing on a previous day on the motion of the Meadow Brook National Bank for a new trial and amendment of judgment or, in the alternative, to correct a clerical mistake in the judgment, and the motion of defendant, Wilson P. Abraham, for amendment of judgment. The Court, having studied the legal memoranda submitted, having heard the arguments of counsel, and having considered all of the evidence, is now fully advised in the premises and ready to rule.

IT IS THE ORDER OF THE COURT that the motion of the Meadow Brook National Bank for a new trial, be, and the same is hereby, GRANTED.

/s/ Frederick J. R. Heebe

Clerk's Office, A True Copy, Feb. 24, 1976, Stephen Hill, Deputy Clerk, U. S. District Court, Eastern District of Louisiana, New Orleans, La.

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